Supreme Court, U.S.
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No. 95-1773

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

STATE OF TEXAS, *et al.*, *Petitioners*

*vs.*

CHERYL J. HOPWOOD, *et al.*, *Respondents*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

# REPLY BRIEF OF PETITIONERS TO THE BRIEF FOR CHERYL J. HOPWOOD AND DOUGLAS W. CARVELL IN OPPOSITION

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## REPLY BRIEF OF PETITIONERS

Nearly all of what respondents Hopwood and Carvell say in their Brief in Opposition ("Opp.") either goes solely to the merits of petitioners' attack on the decision below rather than to the certworthiness of the case, or rests on a tendentious reading of the record and the precedents, or both. Petitioners accordingly respond here only to the proposition, relevant to certworthiness if true, that the petition seeks an "advisory opinion" approving an "admissions program . . . nowhere set forth in the record . . . which . . . they do not intend to implement." Opp. 3. Respondents' claim rests on their assertion that petitioners' "public announcement" that "race 'should play no *determinative* role' in . . . admissions," Opp. 2 (emphasis added), supposedly "suggest[s] that petitioners intend to *comply* with the court of appeals' decision, regardless of how the Court acts on their certiorari petition." *Id.* (emphasis in original).

Respondents are wrong. They err fatally in assuming that the Fifth Circuit's mandate that petitioners "may not use race *as a factor* in law school admissions," Pet. App. A3 (emphasis added) -- a mandate flatly inconsistent with this Court's holding in Part V-C of *Regents of the University of California v. Bakke*, 438 U.S. 265, 320 (1978) -- precludes no more than what petitioners abandoned before trial -- namely, the decisive use of race to classify applicants into separate groups, and to process them under separate race-based criteria. The use of race in that manner, which petitioners have no intention of defending in this Court, is entirely distinct from the use of race as one of many factors relevant to each applicant's background and experience, which characterizes the admissions program petitioners put in place in 1994 and operated until the decision below brought it to a halt prior to the issuance of a stay by the court of appeals on April 19, 1996.

To be sure, further details about the new program, and information about its operation and effects, were not before the courts below and are not part of the record here. But that is irrelevant to the questions presented in the petition, apart from reinforcing the inappropriateness under Article III of the sweeping directives promulgated by the court below. For at issue in this case is not the ultimate validity of the precise admissions program currently employed by the University of Texas School of Law -- a program that all concede this record is inadequate to assess definitively, *see* Pet. 28-29; Opp. 28 -- but the validity, under Article III and the Fourteenth Amendment, of the court of appeals' exercise of the federal judicial power to forbid *any consideration at all* of race as a factor in individualized admissions decisions by that law school, whether to obtain "a diverse student body," Pet. App. A55, or to "remedy[] the present effects of past discrimination by actors other than the law school," *id.*, or for any of the other reasons offered by the law school in this case.[1]

Such consideration of race on an individualized basis is a practice that the petitioners most emphatically *do* engage in and will continue to engage in so long as petitioners' educational aims or remedial duties require, unless and until the stay of the

[1] Respondents' contention that "Judge Wiener's concurrence makes plain" that "the issue at the heart of the petition" is "not squarely presented by this case," Opp. 15-16, is flatly incorrect. Judge Wiener would have held only that the *pre-1994* admissions process -- that is, the two-track process that petitioners have abandoned and that is not being defended in this Court -- was inadequately tailored to the State's interests and would have been invalid even if the court of appeals had not repudiated *Bakke*. Pet. App. A71-72. On the point that *is* presented by the petition for certiorari -- whether, given *Bakke*, the court of appeals erred in prohibiting all consideration of race -- Judge Wiener, together with six other judges dissenting from the failure to grant rehearing en banc, expressed the strong and quite unmistakable view that the Fifth Circuit's decision broke new and deeply disturbing ground. *See* Pet. App. A63-64, A65-66, A72, A75, E1-11.



decision below is lifted and that decision reinstated.[2]

Whether *any* such consideration of "race *per se*," Pet. App. A27, in petitioners' law school admissions process is indeed "proscribed" as unconstitutional, *id.*, as the court below held it to be, is a question unavoidably presented by this case. That question clearly poses issues very different from those presented by the pre-1994 two-track admissions policy that was struck down by the district court in a decision from which petitioners took no appeal and that petitioners do not defend in this Court.

Because those issues are manifestly of great national importance and could not be presented any more squarely than they are here, and because the other questions presented are similarly of undoubted national moment notwithstanding the efforts of respondents to defend the correctness of what the court below did, the petition for writ of certiorari should be granted.

[2] Respondents stitch together selective snippets from a press release by the Texas Attorney General in an attempt to suggest something different. Suffice it to say that the press release does not support respondents' creative interpretation. In any event, the Petition for Writ of Certiorari itself, filed by the Texas Attorney General, expresses the position of the State of Texas.

Respectfully submitted,

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